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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91199018
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re: Application Serial No. 85/094,790	:	
Filed: July 28, 2010	:	
For the Mark: DR. AMLIN	:	Opposition No. 91199018
Published: March 8, 2011	:	
Amylin Pharmaceuticals, Inc.,	:	
Opposer,	:	
v.	:	Attorney Docket No.: 32377-1
Amlin Health, LLC	:	
Applicant.	:	

OPPOSITION TO REQUEST FOR 60 DAY EXTENSION OF TIME AND MOTION TO REOPEN TIME FOR SERVING INITIAL DISCLOSURES

Amylin Pharmaceuticals, Inc. ("Opposer") respectfully requests the Board deny Applicant's "Request For Extension of Time 60 Days and Motion to Reopen Time for Serving Initial Disclosures" ("Applicant's Motion").[1] The deadlines for Applicant's Initial Disclosures and other discovery responses that the Applicant is once again asking be reopened and extended, were set by the Trademark Trial and Appeal Board's October 28, 2011 Order ("Board Order")

[1] Because the Board's October 28, 2011 Order set the Applicant's deadlines for Initial Disclosures and other outstanding discovery responses, Opposer will assume all discovery deadlines are at issue in the Motion despite the limiting caption. Additionally, Opposer recognizes the Board suspended proceedings on December 19 and indicated no papers should be filed that were not germane to Opposer's Motion to Compel. Applicant continues to file confusing papers with the Board and it is difficult to know exactly how to address these filings within the confines of the rules where Applicant has now filed two Extension Requests after a Motion to Compel and failed to specifically identify such Motions in the Extension Request. As Applicant's prior Extension Request was also filed after Opposer's prior Motion to Compel and the Board indicated it was unclear if Applicant's Extension Request was related, Opposer is filing this Opposition in the event the Board will construe Applicant's Motion as a request to extend time to file its response to Opposer's Motion. Accordingly, this opposition could potentially be germane to Opposer's Motion and thus Opposer is filing this Opposition.

and had long passed before Applicant requested this latest extension on December 7. Applicant has not set forth the good cause for the extension by providing facts in sufficient detail and has made no showing that it failed to act because of excusable neglect. Moreover, the requested 60 days is not a reasonable period for an extension considering the response time for the discovery requests at issue was originally 30 days and especially in light of the fact that one extension has already been granted by the Board and the responses are now months overdue.

Additionally, Applicant did not timely file a Response to Opposer's "Second Motion to Compel and for Discovery Sanctions," filed November 18 ("Opposer's Motion").[2] The Response was due December 8, 2011 and Opposer requests the uncontested motion be granted in full.

I. BACKGROUND

The background of this proceeding is detailed in, at least, the Opposer's Motion to Compel and, thus, Opposer will not again recite the earlier details of the Opposition. For further background as it relates to Applicant's Motion, on October 28, the Board issued its Order granting Opposer's July 14 Motion to Compel and ordering Applicant to provide Opposer with its required Initial Disclosures within 15 days of the Order, after also considering Applicant's two extension requests (for 90 and 180 days, respectively). In that Order, the Board also found that the delay was within Applicant's control and the extension would delay the proceedings indicating that the Board fully expects applicant to comply with the deadline as "applicant will now have had nearly four months to prepare such disclosures" (Order, p. 4). The Board also indicated that even if Applicant's representative was out of the country, it had a duty to appoint

[2] Because no mention of Opposer's Motion to Compel was made in Applicant's Motion, it does not appear Applicant's Motion should be construed as an opposition to Opposer's Motion or extension request to oppose such motion; however, Opposer is filing this motion due to the uncertainty created by Applicant's papers.

someone to assist with the Initial Disclosures. After commenting Applicant had not yet abused the privilege of extensions and acknowledging a desire to avoid other motions, the Board also granted Applicant 15 additional days to provide the overdue discovery (which were initially due June 24 and August 3, respectively). Accordingly, the new due date for the Initial Disclosures and Responses was November 12, 2011 (because this date fell on a Saturday, the responses could have been timely served on Monday, November 14).

Opposer did not receive Applicant's disclosures or discovery responses on November 14. On November 15, Opposer sent an e-mail to Applicant inquiring as the status of Applicant's disclosures and discovery responses. To date, Opposer has not received Initial Disclosures or other discovery responses from Applicant, nor did Applicant indicate when Opposer would receive such long-overdue papers, and this was the precise question Opposer asked of Applicant in its November 15 e-mail (see Exhibit D to Opposer's Second Motion to Compel).

Applicant has sent a series of e-mails (on November 5, November 18, and November 21) which are attached to Applicant's Motion at Exhibits A and B. The e-mails did not request extensions of time but, rather, one e-mail requests that the Interlocutory Attorney "HOLD" the proceeding (November 5 e-mail) and another e-mail states that Applicant "hope[s] to start to discussing this case with you after I return to the states from November 30, 2011" (November 21 e-mail). These e-mails do not indicate when discovery would be provided, nor seek Opposer's consent for an extension, nor did Applicant file a proper extension with the Board. Thereafter, Applicant did not contact Opposer nor mention any "extension" until December 7 when it served Applicant's Motion. Despite Applicant's mischaracterizations, such vague, inappropriate e-

mails cannot be construed as "good faith effort[s]" "to resolve the issue with Oppposer" (*see* Applicant's Motion ¶6) or requests for extension of time.

II. APPLICANT'S REQUEST FOR 60 DAYS SHOULD BE DENIED

A. THE REQUEST FOR ADDITIONAL TIME FOR INITIAL DISCLOSURES AND OTHER DISCOVERY RESPONSES DID NOT MEET THE STANDARD TO REOPEN TIME

The period for serving Initial Disclosures and discovery responses pursuant to the Board's Order expired and no appropriate request for extension was made to Opposer or the Board prior to the deadline. Because the time has expired, to reopen time Applicant must now set forth specific facts explaining the reason for the delay and showing the failure to act during the allotted time is the result of excusable neglect. *See* Trademark Board Manual of Procedure (TBMP) § 509.01. Applicant has not made any such showing. Additionally, regardless of Applicant's failure to identify any legitimate justification, 60 days is too long a period for an extension and the length of delay is also a factor to be considered. *See* Fed. R. Civ. P. (FRCP) 6(b); TBMP § 509.01(b).

As explained in FRCP 6(b) and TBMP 509,

> When an act may or must be done within a specified time, the court may, for good cause, extend the time:
>
> > (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
> >
> > (B) on motion made after the time has expired if the party failed to act because of excusable neglect.

Applicant's Motion puts forth two alleged excuses for violating the Board's Order: It was "out of the country" (from September 10 to November 30, *see* Applicant's Motion § 2) and

it was "sick" (apparently from November 30 to December 7, *see* Applicant's Motion § 1). First, Applicant is a Maryland limited liability company and, as the Board previously indicated, Applicant should appoint another representative if it has issues attending to this proceeding. Second, neither excuse is substantiated with the requisite facts to show good cause, no less excusable neglect under the guidance provided under *Pumpkin Ltd. v. Seed Corps.*, 43 USPQ2d 1582, 1586, n. 7 (TTAB 1997).

Applicant's statement that it was yet again "out of the country" is unsubstantiated, does not detail how missing another deadline was not in its control and does not explain, *inter alia*, why it was not preparing the overdue documents all along, why it did not respond to Opposer's inquiry regarding when the documents would be provided, why it could not request a proper extension, how that was affected by being out of the country when he is still conducting other business and checking and sending e-mails, and how an illness well after the deadline is a proper excuse. Simply providing an after-the-fact excuse stating one person was on a "trip" does not set forth sufficient facts to show the missed deadline was not necessitated by a lack of diligence or unreasonable delay. *See Luemme, Inc. v. D.B. Plus Inc.*, 53 USPQ2d 1758, 1760-1761 (TTAB 1999) (finding plaintiff failed to set forth detailed facts concerning the circumstances -- plaintiff's allegedly busy travel schedule -- which necessitated the extension, and record showed that need for extension in fact resulted from plaintiff's delay and lack of diligence during previously-set discovery period). Dr. Zhang's presence in another country from September 10 to November 30 is not evidence of Applicant's good cause or excusable neglect where Applicant had prior notice of the deadlines for months, knew this matter was pending and, as mentioned previously by the Board, Applicant should have designated a representative to assist.

Additionally, even if Dr. Zhang was ill during the period claimed (which appears to be proffered as an excuse for not acting from November 30 to December 7), this illness occurred well after the Board's November 12 deadline and is not sufficient to excuse the failure to comply with the deadline. It is clear the excuses proffered by Applicant are insufficient and do not rise to the level of excusable neglect.

Applicant states in its Motion that it has "repeatedly told Opposer that he will handle this issue in a timely manner (went to abroad is an exceptional case)" (*see* Applicant's Motion ¶6). Despite characterizing its alleged trip abroad as "an exceptional case," this is the second time within a few months that Applicant has placed such an excuse before the Board. In its July 28 Motion for Extension of Time, Applicant informed the Board that it had been out of the country from May 30-July 19, 2011 and apparently it claimed this is why it could not meet the original Initial Disclosure deadline. Although, in effect, Applicant was provided more time, this excuse was rejected by the Board and the Board essentially indicated that this excuse is insufficient. Unfortunately, Applicant's trips and improper attention to this proceeding are disruptive to the proceeding, and this is only the beginning of discovery. There will be many more deadlines to meet in the coming months to keep this proceeding on track. With this track record of missed deadlines and insufficient excuses, and requests for excessively long extensions after such missed deadlines, Opposer is concerned that Applicant will continue this pattern and will needlessly and inappropriately require the Board to get involved without moving this matter forward. Applicant states that it will "follow the rules that the Board sets[,]" (*see* Applicant's Motion ¶6) but such has not been the case to date and Opposer has concerns that Applicant does not appreciate this matter will require some attention to follow the rules and meet deadlines.

Applicant has the burden of persuading the Board it has been diligent in meeting its responsibilities and such has not been done. *See* TBMP § 509.01(a), n.2. The Rules explain the Board should carefully scrutinize any motion to determine if the requisite good cause has been shown. *See* TBMP § 509.01(a). It is clear Applicant's Motion has not set forth good cause or satisfied the excusable neglect standard.

Moreover, sixty days is a long period of time to extend a deadline and this delay, its impact on the proceedings and prejudice to movant must be considered, especially in light of the considerable delay already caused by Applicant and the generous extension previously granted to Applicant. This delay is totally within Applicant's control, which is unsupported by any legitimate reason or facts and which implicates several missed deadlines, and creates prejudice through difficulty in prosecuting the opposition and delay in resolution. For example, Opposer was forced to file a second motion for discovery sanctions and now to respond to yet another motion to extend time and Applicant has now filed multiple papers which are confusing and do not follow the Rules – either procedurally or substantively. Instead of simply preparing Initial Disclosures and discovery responses, Applicant ignored the Board's latest deadline, filed a wholly deficient paper and did not address Opposer's outstanding Motion for Sanctions in any way. Applicant has hindered moving this case forward, forced Opposer to respond to inappropriate papers and inquiries by Applicant, and is inhibiting Opposer's strategy to pursue the merits of the case promptly and efficiently. Moreover, while Opposer recognizes Applicant is now proceeding *pro se*, it must still pay attention to deadlines and follow the Rules, as warned by the Board. The deadline for Initial Disclosures is typically 30 days after the deadline for the discovery conference and 60 days is in no way a reasonable period to extend time, apart from the

other deficiencies in the request, as detailed above. Unfortunately, by filing such papers, Applicant has in essence received the 180 day extension that was previously rejected by the Board as excessive. The Board previously acknowledged the delay caused by Applicant's improper request, and the further delay is more problematic.

B. THE 60 DAY REQUEST FOR ADDITIONAL TIME FOR INITIAL DISCLOSURES AND OTHER DISCOVERY RESPONSES DID NOT SET FORTH GOOD CAUSE AND IS AN UNREASONABLE PERIOD FOR AN EXTENSION

While Applicant did not seek nor file a proper extension request prior to the Board's November 12 deadline, even construing, *arguendo*, Applicant's November 5 e-mail (discussed above) as a timely request for extension of time to oppose Opposer's Motion, Applicant's Motion must still fail as Applicant has wholly failed to set forth the good cause for the extension. Similarly, while Applicant did not seek nor file a proper extension request of its December 8 deadline to respond to Opposer's Motion, even construing, *arguendo*, Applicant's Motion as such a request, Applicant's Motion must still fail as Applicant has wholly failed to set forth the good cause for the extension.

As discussed above, Applicant failed to set forth the good cause for either extension or any supportive facts. No facts showing its diligence prior to the November 12 deadline or the December 8 deadline have been provided and mere conclusory allegations lacking in factual detail are not sufficient. Such facts are required for Motions to Extend under TBMP § 509.01(a) and the Board will scrutinize carefully any motion to extend time. Considering the requisite facts have not been proffered, Applicant has not met its burden to show good cause and, moreover, considering the responses themselves are due 30 days after service (or 35 days for mail service) and an opposition to Opposer's Motion was due 15 days after service (or 20 days

for mail service), sixty days is an unreasonable period to extend time, especially in light of the previous extension granted by the Board.

CONCLUSION

Opposer respectfully requests that the Board enter an order: 1) denying Applicant's request for a 60 day extension and to reopen time; 2) granting Opposer's Second Motion to Compel and For Discovery Sanctions and sustaining this Opposition; and/or 3) taking any other appropriate action the Board deems just and proper.

Respectfully submitted,
Amylin Pharmaceuticals, Inc.

Date: December 22, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December 2011 a true and correct copy of the foregoing document was caused to be served on the following parties as indicated:

VIA E-MAIL AND FIRST CLASS MAIL

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